

# The US Armed Forces at the Mexican Border – Entering Legally Murky Territories?

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The Trump-Administration is increasingly concerned about the security situation within Mexico. It views it as a threat to national security in light of its cross-boundary implications, such as the flow of irregular migrants and drugs into the US (for further details see [Cooper](#)). In reaction, President Trump has decided, among other measures such as building a wall (see [Proclamation 9844](#), establishing a [controversial](#) 'state of emergency' to fund it), to [deploy](#) nearly 5,000 troops to the Southern border. Crucially, 3,000 are active-duty servicemen falling under the federal chain of command (the US Northern Command – NORTHCOM) and 2,100 are National Guard members, reporting to State governors, but figures could [increase](#). Currently, the military [supports](#) the US Customs and Border Protection's activities (Department of Homeland Security) on American soil. However, there is a real possibility that in the future such troops may be used for a direct military intervention in Mexico. Both forms of engagement raise legal questions that give reason to assess the US positions on international law, and at the same time call for further in-depth analysis.

## The legality of the US military's deployment for domestic use

The legal framework governing the use of the military at home has recently received much attention in the US (e.g. Prof. Banks and Prof. Dycus' [2016 book](#)). [Legal commentators](#) and policy-makers are generally cautious in recognizing a domestic role for the US military. In particular, under the [Posse Comitatus Act](#) (PCA), troops operating within the federal chain of command must not be tasked with law enforcement activities (see the November 2018 CRS [Report](#), pp. 56-57, and [Newitt](#)). This means in essence, as Mark Newitt clarifies in his excellent [post](#), that active-duty military personnel under federal control are prevented from *directly* assisting law enforcement agencies and performing activities. This includes, for example, searches, seizures, arrests, evidence collection or establishing checkpoints. *Indirect* support activities however are allowed. Accordingly, providing/operating military equipment, sharing information, providing aerial reconnaissance or detecting and monitoring the border areas is arguably permissible (see [10 U.S.C. §§ 271-284](#) and [10 U.S.C. §124](#)). It is interesting to note that the PCA seems not to apply [extraterritorially](#) (see for discussions [Newitt](#)). This could allow the military to participate lawfully in law enforcement activities *abroad*– subject to the limitations on support by US military to foreign law enforcement agencies established through the [US Code](#).

It is arguably in this light that the Trump-administration limited the use of force by military personnel involved in border control activities along the Southern border

to the standard defensive force provided by the [UN Basic Principles on the Use of Force](#) (see [here](#) and [here](#)). Whether this is enough, is however questionable. As William Banks [has rightly observed](#), these rules also include actions such as crowd control, temporary detention and cursory search – all measures which are hardly reconcilable with the concept of ‘indirect assistance’. A possible way out, to bypass the legal constraints provided by the PCA, could be the [1807 Insurrection Act](#), which it is [rumored](#) that President Trump might intend to invoke. Arguably, this would allow the military to engage in direct deportation of irregular immigrants (for a legal commentary see [here](#)), or at least [loosen rules](#) that prevent US military officers from interacting with them. For the President to apply the Insurrection Act, however, ‘[unlawful obstructions \[...\] or rebellion against the authority of the United States](#)’ must take place. At present, this seems hardly to be the case.

### **Legal questions arising with potential US military operations in Mexico**

Whether or not secret US military operations in Mexico have been already conducted is hardly ascertainable on the basis of publicly available documents. However, various developments allow the conclusion that such an option is no phantasm. For instance, there are reports of American drones already [conducting](#) intelligence operations over the Mexican territory and thus being directly involved in Mexico’s fight against drugs (see also [Barry](#), p. 52). [Official statements](#) indicate the existence of unspecified US military operations in Mexico as well. In addition, both the US Administration and congressmen have repeatedly called for the military to actively step in (see [Weissman](#)). In January 2017, in a famous [telephone call](#) with the then Mexican President Peña Nieto, President Trump explicitly referred to the possibility to send troops to Mexico to fight drug cartels. A potential US military operation in Mexico accordingly deserves legal thought.

Any military operations in Mexico would most likely be conducted with Mexico’s consent (on the matter of ‘intervention by invitation’ see gen. the *Insitute de Droit International’s* 2011 [Resolution](#)). The political, social and economic relationship between the two countries is too close to realistically imagine a US unilateral intervention. As such, a US military operation in Mexico could be construed as a form of military assistance provided in the framework of an international cooperation agreement, e.g. under the [Merida Initiative](#) umbrella (see the 2017 CRS [Report](#)), as it happened in the past in [Colombia](#) with ‘Plan Colombia’. Should the situation in Mexico be classified as a Non-International Armed Conflict (NIAC), this would require considering whether the consent provided would be valid and the intervention would affect Mexico’s territorial integrity or political independence (see e.g. [Byrne](#) and [De Wet](#)).

Alternatively, if Mexico was unwilling to cooperate and unable to deal with the situation appropriately, a US military intervention could be justified as a means of self-defense against trafficking organizations. Amongst other conditions, the US would need to prove that Mexican traffickers are launching an ‘armed attack’ (see [Bethlehem’s](#) theory on the matter). Not at least as the US authorities themselves have always denied a significant ‘spillover violence’ from Mexico into the US (see the 2013 CRS [Report](#)), such a claim is factually and legally hard to establish.

Notwithstanding that, [reportedly](#) some Latin American States, [including Mexico](#), seem concerned about a possible use of the self-defense theory invoked by the US and its allies to intervene in Syria, for the risk that the same theory may constitute the basis for a military intervention in their territories.

Domestically, the operation in question could rest on the 2001 [AUMF](#) and be labelled as a counterterrorism operation (in this respect, some [studies](#) depict drug cartels as a form of ‘narco-insurgency’). This would require to: 1) confer a terrorist status to Mexican criminal organizations; and 2) posit that these organizations represent an imminent threat to the US national security because of their link with the authors of the 9/11 attacks (see, *mutatis mutandis*, the conditions for the legality of the [US targeted killing program](#)). With regard to the first aspect, earlier this year, Trump declared in an [interview](#) that his Administration is thinking very seriously about designating Mexican drug cartels as foreign terrorist organizations under the [US Federal Code](#) (for further details on this option see Curran). The second aspect seems instead – in legal terms – less stringent. In fact, although the AUMF was meant to only concern ‘nations, organizations, or persons [who] planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001’, it has been used since 2001 by all US Administrations to [legally justify](#) the launch of virtually any military operations abroad (see the 2015 CRS [Report](#)). As a result, [reportedly](#) today the US government is actively engaged in counterterrorism operations in 80 nations on six continents.

In theory, it could be the UN Security Council itself to authorize a military intervention against Mexican traffickers/terrorists (see e.g. Tams) but this possibility seems totally unlikely in the present political circumstances.

The choice of the legal basis for an intervention may have implications on which legal regime governs the use of force. An operation under the self-defense regime or the AUMF would automatically imply the existence of a NIAC between the Mexican criminal organizations and the US *itself*. International Humanitarian Law (IHL) would apply ([DoD LoW Manual](#), p. 9 – [Nuclear Weapons case](#), para 42). For the US troops, this would mean applying [Common Article 3 to the Geneva Conventions](#) and customary IHL provisions, hence special rules concerning the use of force, detention, and prosecution ([Sánchez](#), pp. 492 ff.).

If the military operation were based on Mexico’s consent, the applicable legal framework would depend on the existence of a conflict between the Mexican government – who would be assisted by the US military – and drug traffickers/migrant smugglers (for further details see the ICRC’s ‘[support-based approach](#)’ on the notion of armed conflicts). The issue is disputed. There are legal scholars who support the existence of a NIAC in Mexico (see e.g. [Bergal](#); [Comer & Mburu](#); [Bloom](#); [Corn & Kaleemullah](#); [Chelluri](#); [Wotherspoon](#)), while others disagree (e.g. [Rodiles](#), [Crawford](#), p. 189; [Sánchez](#); [Neely](#)). This classification has wide implications. For example, it might also affect the US Administration’s capacity to deport irregular immigrants back to Mexico. In fact, in case of a NIAC, immigrants would become refugees under the US Code ([8 U.S.C. §§ 1101\(a\)\(42\)\(A\)](#)) – a definition that resembles that of Article 1 of the [1951 Geneva Convention](#)). In addition, immigrants would be granted the protection afforded to civilians by [Common Article 3 to the](#)

[Geneva](#) Conventions, with which the current US detention policies could be said to stand at odds (for further details see [Hatoum](#), p. 73 ff).

If no armed conflict is presumed, the operation must comply with international human rights law (IHRL – see [Neely](#)). Although the US Government officially maintains ([E/CN.4/SR.138](#), para 34 and [here](#)) that the ICCPR and other major human rights treaties apply exclusively territorially ([Van Schaack](#)), US military manuals admit that at least customary IHRL may – to some extent – apply to US military operations abroad (2017 JAG’s [Operational Law Handbook](#); [Goodman](#); see also the [1986 US official statement](#) concerning fundamental HR norms).

Even then, the application of IHRL would depend on whether the affected individual would be under the US jurisdiction (see on the matter [Wilde](#), p. 637). The US position here is ambivalent. While the US would probably accept that a trafficker detained by US forces in Mexico would come within the US jurisdiction (see *mutatis mutandis* [Boumediene](#) and [Munaf](#)– see also the [US position](#) re the CAT’s extraterritorial application), it most likely would reject establishing jurisdiction in the case US forces would shoot a Mexican trafficker or would search his house (see [Verdugo-Urquidez](#)). Of course, it does not require further emphasis that this US hard-line position is isolated, and has generated extensive criticism by several human rights bodies (see e.g. [Van Schaack](#), p. 53 ff.). US military operations in Mexico would give rise once more to scrutinize the US legal position.

This is all the more so if US forces would operate from US territory, and their conduct would only produce transboundary effects as arguably in case of armed/unarmed drone operations over Mexico or electronic espionage. It will be interesting in this respect to see the [upcoming](#) and final US Supreme Court decision in [Hernandez v. Mesa](#). This case concerned a US border patrol agent standing on US soil who shot and killed a Mexican teenager standing on Mexican soil. As brilliantly observed [elsewhere](#), this case ‘could impact the legality of worldwide extraterritorial national security activities by the U.S. government like electronic surveillance and drone strikes’ – also shaping potential US operations in Mexico.

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